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Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

CHEVRON CHEMICAL COMPANY,

Plaintiff-Appellant,

vs.

CRAIG W. MECHAM,

Defendant-Respondent,

and

R. KENT HEILESON,

Defendant.

Case No. 14423

BRIEF OF APPELLANT CHEVRON CHEMICAL COMPANY

Appeal from the Judgment of the Third District Court for Salt Lake County, Honorable James S. Sawaya, Judge

---

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FILED
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IN THE SUPREME COURT OF THE STATE OF UTAH

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IN THE SUPREME COURT OF THE STATE OF UTAH

CHEVRON CHEMICAL COMPANY, Plaintiff-Appellant, vs. CRAIG W. MECHAM, Defendant-Respondent, and R. KENT HEILESON, Defendant.	Case No. 14423

BRIEF OF APPELLANT
CHEVRON CHEMICAL COMPANY

NATURE OF THE CASE

This appeal raises the issue whether a Utah resident who incorporates a business in Idaho for personal profit, and who personally guarantees the Idaho business account of such corporation, but who regularly engages in the management of such corporation only by long-distance communication, is subject to suit in Idaho upon default on such personally guaranteed account.

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DISPOSITION IN THE LOWER COURT

The Seventh District Court of Idaho, Bonneville County, took jurisdiction of the action and gave judgment against the Utah resident. The Third District Court of Utah, Honorable James Sawaya presiding, dismissed plaintiff-appellant's action to enforce the Idaho judgment.

RELIEF SOUGHT ON APPEAL

The present appeal seeks reversal of the Third District Court dismissal, and an order that summary judgment be entered for plaintiff-appellant.

STATEMENT OF THE FACTS

The essential jurisdictional facts were all admitted, either in the Complaint and Answer, Requests for Admissions and Answers, or the Deposition of defendant-respondent Mecham taken September 9, 1975. The admitted jurisidctional facts are as follows: In or about 1968, defendant-respondent Mecham and defendant Heileson, and their fathers, incorporated Great Basin Grain Company as an Idaho corporation, having its chief place of business at Tetonia, Idaho. The intent of the incorporation was to obtain profits for the incorporators. The day-to-day management of Great Basin Grain Company was

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given to defendant Heileson. Defendant-respondent Mecham ordinarily remained in Utah. Mecham, however, received from defendant Heileson at least annually, telephone reports on the conduct of the business and gave his advice as to such reports. On at least one occasion, Mecham traveled to Idaho on business of Great Basin Grain Company. In or prior to August, 1968, it was determined by Great Basin Grain Company to open an account with Chevron Chemical Company for the purchase of various products, chiefly fertilizer. Mecham and Heileson were informed by Chevron that credit would not be so extended unless personal guarantees of the account were received by Chevron from incorporators of Great Basin. A joint guarantee was thereupon given by Mecham and Heileson. The form of guarantee was prepared by Chevron at its Portland, Oregon, office. The document was then mailed to Idaho where it was signed by Heileson, and to Utah, where it was signed by Mecham. Thereupon, an account was opened pursuant to which Chevron would deliver products to Great Basin Grain Company at Tetonia, Idaho, and there receive payment for the same. When Great Basin defaulted on its account, suit was brought in Idaho on the guarantee, resulting in the judgment now sought to be enforced. Mecham was served in Utah under the Idaho long-arm

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statute. Heileson was served in Idaho.

ARGUMENT

POINT I.

DEFENDANT-RESPONDENT WAS DOING BUSINESS IN IDAHO BY CORPORATE AGENT.

The Idaho long-arm statute, Idaho Code Section 5-514, is as follows:

> "5-514. Acts subjecting persons to jurisdiction of courts of state.
>
> "Any person, firm, company, association or corporation, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits said person, firm, company, association or corporation, and if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of said acts:
>
> (a) The transaction of any business within this state which is hereby defined as the doing of any act for the purpose of realizing pecuniary benefit or accomplishing or attempting to accomplish, transact or enhance the business purpose or objective or any part thereof of such person, firm, company, association or corporation;
>
> (b) The commission of a tortious act within this state;
>
> (c) The ownership, use or possession of any real property situate within this state;
>
> (d) Contracting to insure any person,

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property or risk located within this state at the time of contracting;

(e) The maintenance within this state of matrimonial domicile at the time of the commission of any act giving rise to a cause of action for divorce or separate maintenance."

The case of Salter v. Lawn, 294 F.Supp. 882 (D.C. Mass. 1968) arose upon facts and under a statute essentially identical to those involved in the present case. There defendant, a New Jersey resident, organized a New York corporation to do business in Massachusetts. Defendant was to receive 10% of the profits and remit the remainder to a financial backer. Defendant went to Massachusetts in connection with the organization and subsequently in connection with the business. The corporation became indebted to Massachusetts banks on notes of the corporation, apparently made in New York and delivered in Massachusetts. Defendant personally guaranteed the notes by endorsing them, apparently also in New York. When the corporation went bankrupt, it appeared that defendant had caused corporate funds to be used to pay off the guaranteed notes. The trustee of the bankrupt sued in Massachusetts, serving defendant in New Jersey, alleging that such payments were unlawful and that defendant remained liable on the guarantees. The U. S. District Court asserted jurisdiction, denying a motion to quash,

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on the following grounds:

> The "Long Arm" statute, Mass. G.L. c. 223A §3(a) provides that "... a court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action arising from the person's ... transacting any business in this commonwealth." Of course, the statute is incorporated by reference as appropriate for service in an action brought in the United States District Court for the District of Massachusetts.
>
> On the facts recited, defendant having organized, used, and controlled the bankrupt corporation with the sole purpose of carrying out his agreement with the bishop under which he is to receive 10% and the bishop 90% of the profits of the nursing homes, it follows as a matter of law that:
>
> (1) The bankrupt corporation was in all its business defendant's agent.
>
> (2) Defendant was "a person who acts... by an agent" as to all causes of action arising from the bankrupt corporation's "transacting any business in the commonwealth."
>
> (3) The bankrupt corporation's uses of its deposits in a Massachusetts bank to pay obligations due to that bank in Massachusetts were examples of defendant himself and not merely the bankrupt corporation "transacting... business in this Commonwealth."

The only substantial difference between Salter v. Lawn and the present case is that Great Basin Grain Company was not only doing business in Idaho, it was an Idaho corporation.

While cases involving guarantees are not numerous, there is sufficient agreement among courts which have considered

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the problem to support the statement of a general rule that in a commercial setting the giving of a guarantee of performance of a contract is sufficient transaction of business within the state in which the contract is to be performed to submit the guarantor to that state's jursidiction under the usual long-arm statute.

In State ex. rel. Ware v. Hieber, 515 P.2d 721 (Or. 1973), defendants, California residents, gave a personal guarantee of the account of a Nevada corporation doing business in Oregon. The guarantee was prepared in New York, executed in California, and returned to New York. It recited that it was governed by the laws of New York. The Oregon Court found jurisdiction in Oregon over the California defendants. The Court said:

> If we were to view the Ware's guarantee as a transaction completely separate from the transaction between Black Diamond and Keller Enterprises, the connection between the Wares and Oregon would be slender. We do not consider it realistic, however, to consider the guarantee in a vacuum. From the standpoint of "fairness" to the parties and convenience to the parties and from the standpoint of the interests of the State of Oregon, we are of the opinion that the personal guarantee of the Wares must be considered as one aspect of the entire course of business between Keller Enterprises and Black Diamond.

In First-Citizens Bank & Trust Co. v. McDaniel, 197

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S.E.2d 556 (N.C. 1973), involving a guarantee of a commercial loan, the North Carolina Court said: "Where the non-resident defendant promises to pay the debt of another, which debt is owed to North Carolina creditors, such promise is a contract to be performed in North Carolina and is sufficient minimal contract upon which this state may assert personal jurisdiction over the defendant."

Two cases involving guarantees have found no jurisdiction over the non-resident guarantor. These cases are readily distinguished from the present case, however. Misco Leasing, Inc. v. Vaughan, 450 F.2d 257 (10 Cir. 1971), involved a contract signed in Oklahoma for delivery to an Oklahoma business of machinery from Kansas. A guarantee of payment was signed in Oklahoma. The contracting party and the guarantor were residents of Oklahoma. The court found no jurisdiction in Kansas over the Oklahoma defendants. Clearly, however, the case involved guarantee of a contract to be performed in Oklahoma, and had been given to further the activities of an Oklahoma business. In D.E.B. Adjustment Co. v. Dillard, 508 P.2d 420 (Colo. 1973), a California resident executed a note in Colorado for payment of a Colorado debt (for college room and board). Subsequently, the debtor's mother executed

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in California a guarantee of her son's note. The Colorado Court found that there was Colorado jurisdiction over the son, but not over the mother. This case, however, clearly involved a non-commercial transaction. Moreover, the mother's guarantee was given after the son's debt arose. It was not given to induce extension of credit to the son, and for that reason was not in furtherance of his transaction of business in Colorado.

At hearing on cross motions for summary judgment herein, defendant-respondent cited Ferrante Equipment Co. v. Lasker-Goldman Corp., 258 N.E.2d 202 (N.Y. 1970), in response to the foregoing authority. Ferrante, however, is not in point either on the law or the facts. In that case, the New York Court held that the giving of a personal guarantee of a New York business account by a foreign resident was not enough to subject the foreign resident to New York jurisdiction where the foreign resident had never set foot in New York. The New York long-arm statute requires at least one physical contact with New York; thus the court in Ferrante held that "'a single transaction in New York' would be sufficient" (258 N.E.2d 202 at 204), but such transaction not having occurred, no jurisdiction existed. The Idaho Supreme Court has specifically held that physical presence in Idaho is not necessary to doing business

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under the Idaho long-arm statute. Intermountain Business Forms, Inc. v. Shepard Business Forms Co., 531 P.2d 1183, 96 Idaho 538 (1975). Thus Ferrante is not applicable in interpreting the Idaho long-arm statute. In any case, defendant-respondent Mecham admits at least one trip to Idaho in connection with the business of Great Basin Grain Company. Thus, it appears, in view of the language from Ferrante quoted above, the New York Court would assert jurisdiction over Mecham in the present case.

POINT II.

THE UTAH CASES ARE IN HARMONY WITH THE RULE THAT PERSONAL GUARANTEE OF A COMMERCIAL ACCOUNT SUBMITS THE GUARANTOR TO JURISDICTION OF THE PLACE WHERE THE ACCOUNT IS MAINTAINED.

The Utah courts have generally required more than isolated physical contacts in order to constitute doing business for purposes of long-arm jurisdiction. The chief antecedent of this jurisdictional attitude in Utah is the famous case of Conn v. Whitmore, 9 U.2d 250, 342 P.2d 871 (1959), interpreting the pioneering Illinois long-arm statute.

In Conn, the Utah defendant had purchased horses in Illinois by mail, sending the final installment on the price with an agent who picked up the horses in Illinois. The Utah

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Court refused to enforce an Illinois judgment where jurisdiction was based on such conduct. Conn founded a line of Utah cases in which the Court has ruled that transitory contact with a state for purposes of completing a limited transaction is not enough for jurisdiction. Hydroswift Corp. v. Louie's Boats & Motors, Inc., 27 U.2d 233, 494 P.2d 532 (1972); Pellegrini v. Sachs, 522 P.2d 704 (1974); Mack Financial Corp. v. Nevada Motor Rentals, Inc., 529 P.2d 429 (1974).

On the other hand, the Utah Court has often been at pains to make clear that a foreign defendant who has taken advantage of the benefits of the laws and economic climate of Utah by such substantial purposeful activity, as to have maintained a real and continuous business presence here will be subject to the jurisdiction of the Utah courts as to all causes arising out of such business. Hill v. Zale, 25 U.2d 357, 482 P.2d 332 (1971); Foreign Study League v. Holland-America Line, 27 U.2d 442, 497 P.2d 244 (1972); Pellegrini, supra; Mack Financial Corp., supra. Where defendant has engaged in such systematic economic exploitation, it is not determinative that the defendant has personally entered the state a bare minimum of times. The latter point is readily demonstrated by comparing Conn with Foreign Study League, and Hill v. Zale, supra.

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In Foreign Study League, it appeared that defendant, a foreign cruise shipline not qualified in Utah, sold approximately $600,000.00 worth of services a year in Utah. While defendant had no regular employees in Utah, its services were regularly offered through eighteen or nineteen independent travel agents. Defendant occasionally sent employees to Utah to encourage the independent agents to sell defendant's services. Plaintiff was engaged in organizing study cruises, and regularly arranged for such cruises on defendant's ships. Defendant's officers occasionally appeared in Utah to discuss that business with plaintiff. Relying upon Hill v. Zale, supra, the Court found that defendant was sufficiently present in Utah to subject it to suit.

An interesting dissent by Justices Crockett and Ellett in Foreign Study League points out that the physical contacts with Utah of employees of defendant in that case were not substantially greater than those in Conn v. Whitmore.

In Hill v. Zale, supra, plaintiff sued a Texas corporation by serving an officer at one of defendant's Utah outlets. The suit was for wages earned in Alaska. Defendant alleged that the Utah and Alaska stores were separately incorporated, and that the parent, a separate Texas corporation, was not present

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in, and could not be sued in, Utah for any default of the Alaska store. The Court pointed out that the officers of each separate Zale corporation were in all cases nearly identical, that the profits of each operation were funneled to the parent corporation in Texas, and that the expenses of each operation were paid in Texas. The Court found that Zale-Texas had "enjoy[ed] the advantages of having activities carried on within [this] state to further its business interests under the protection of its laws," and that "the defendant corporation has in a continuous and regular manner over a period of years maintained such contacts and carried on such activities within the state of Utah by the various means it employs that it should be subject to the jurisdiction of its courts."

The comparison between Hill v. Zale, and Foreign Study League on the one hand and Conn v. Whitmore on the other strongly suggests that where defendant has systematically exploited the Utah economy by selling goods or services there and profiting thereby, jurisdiction will be found in Utah even though defendant's physical contacts with the state have been minimal; whereas, intermittent physical contact with the state in connection with the business out of which the claim arises probably will not be enough for jurisdiction unless it indicates or

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coincides with systematic economic exploitation.

Even admitting arguendo that defendant Mecham's physical contacts with Idaho in this case were few, a clearer case than the present of systematic economic exploitation of the Idaho legal and economic climate can hardly be imagined. Mecham and company took advantage of the Idaho laws by incorporating an Idaho corporation to do business there. They took advantage of the economic climate of Idaho by endeavoring to sell farm products to Idaho farmers through an on-the-spot business manager with whom Mecham was in regular communication for the purpose of running the business. Mecham personally guaranteed the commercial account of the corporation for the purpose of inducing a course of business in Idaho. When Mecham's Idaho concern defaulted on the credit Mecham had personally induced Idaho citizens to extend to it, the victims of such conduct ought to have had a remedy in Idaho. That is the force and effect of the rule established in the numerous cases from other states cited above: Where, for the purpose of inducing an ongoing course of commerce in a state, a foreign resident personally guarantees the business account of a local business to local citizens, and such course of commercial conduct ensues and results in injury, the foreigner ought

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to be subject to local jurisdiction in suits arising therefrom. The Utah rule is entirely in accord: Where a foreign resident systematically exploits the economic and legal climate of Utah by establishing an ongoing course of business here, he is subject to Utah jurisdiction on complaints of Utah citizens arising from such business, notwithstanding he may have been physically present in the state a minimum of times.

POINT III.

NO HARDSHIP OR INJUSTICE WAS WORKED UPON DEFENDANT-RESPONDENT BY REQUIRING TRIAL IN IDAHO.

Defendant-respondent alleged in the Third District proceeding herein that it was unduly hard and unjust to require him to face trial in this matter in Idaho. This seems a peculiar allegation from a man who incorporates businesses in Idaho and takes an active part in their management. Defendant-respondent alleged that it would have been easier and more just for a "giant" like Chevron to forego its right to sue in Idaho where the default occurred and instead pursue Mecham in Utah. The inconvenience of the Idaho forum is demonstrated, defendant-respondent alleged, by the fact that no Idaho residents testified at the trial.

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No Idaho residents testified because Heileson, the Idaho manager of Great Basin Grain Company and the chief witness in the trial, had moved out of the state by the time the trial began.

The claim that suit would have been more convenient in Utah simply ignores the fact that such a course would require, at best, two actions -- one against Heileson in Idaho and one against Mecham in Utah -- and might foreclose any action. The obligation of Mecham and Heileson on the guarantee was joint. The evidence indicates that Heileson had not entered Utah on any business of Great Basin Grain Company. Heileson was an Idaho resident. It is instantly apparent that Heileson could not be sued in Utah. If Mecham was to be sued in Utah, Heileson would have to be sued separately in Idaho. Insofar, however, as the obligation was joint, each defendant in each separate action could claim that the other was an indispensable party who could not be joined. Separate actions could result in inconsistent liabilities on the same obligation. It is not farfetched to assert that both Utah and Idaho courts might have dismissed such separate actions for failure to join the joint obligors.

Defendant-respondent simply ignores these difficulties

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of separate actions for plaintiff-appellant, and purports to find a balance of equities in relieving defendant-respondent from having to answer for his defaults where committed. Certainly the balance of equities -- and perhaps the balance of outright necessities -- required trial of this action in Idaho.

POINT IV.

DEFENDANT-RESPONDENT'S COLLATERAL OBLIGATIONS ARE NOT WELL TAKEN.

Defendant-respondent argued at the hearing before Judge Sawaya that plaintiff-appellant's judgment was unenforceable insofar as it was partially based upon Count II of the Third Amended Complaint in the Idaho proceeding, relating to secured debt owed by defendant-respondent to Bank of Salt Lake and assigned to plaintiff-appellant. Defendant argued that any judgment based on Count II was invalid because defendant-respondent was not personally served with the Third Amended Complaint. This argument is incorrect, as shown below. In any case, the judgment sought to be enforced herein was based entirely upon the single count of the Complaint (Count I of subsequent Amended Complaints), as shown by the Idaho judge's Supplemental Findings of Fact and Conclusions of Law.

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As Findings 1 and 2 show, the basic amount owing to plaintiff-appellant from Great Basin Grain Company on open account (not on the loan from Bank of Salt Lake), was $27,215.90. This figure, less a finance charge not owing, came to $23,343.48 (Finding 7). Interest at the legal rate on the account brought the figure to $30,966.69 (Conclusions 2, 6), from which were subtracted a set-off of $1,394.82 (Finding 10, Conclusions 3, 6), a judgment for costs of $1,608.05 (Conclusions 4, 6), and interest of $90.08 (Conclusion 6). Finally, plaintiff-appellant's costs of $261.50 were added (Conclusion 6) to obtain a figure of $28,055.39, for which figure judgment was given. This figure plainly represents an amount owing on the account guaranteed by Mecham, as alleged in the single count of the Complaint, together with interest and costs. None of the figure is attributable to Count II of the Third Amended Complaint.

It is immaterial to enforcement of a judgment on the single count of the Complaint whether Mecham was properly served with subsequent Amended Complaints.

Defendant-respondent also alleges, however, that after being personally served with the Complaint, he did not receive any subsequent Amended Complaints. These were served upon his

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attorney, who had appeared specially to contest jurisdiction of the Complaint. Defendant-respondent alleges that under the Idaho Rules of Civil Procedure, all amended complaints adding claims must be served upon the defendant directly, and cannot be served upon defendant's attorney, and that a judgment on such an amended complaint served on the attorney is void. The applicable Idaho Rules are identical to the Utah Rules on the subject. Defendant-respondent is simply incorrect about the effect of service on the attorney.

Rule 5(b), Idaho Rules of Civil Procedure, provides:

> Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court.

All amended complaints must be served, of course. Rule 5(a). Thus, it is not only correct to serve the amended complaint upon the attorney, it would be improper to serve the defendant himself unless the court so ordered.

Defendant-respondent was apparently confused by Rule 5(a). That enumerates the papers which must be served, concluding:

> ... but no service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief

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against them shall be served upon them in the manner provided for service of summons in Rule 4.

New or additional claims must be served directly upon parties in default who have not appeared. This provision -- identical to the Utah Rule -- was never applicable in this case, since Mecham had appeared and was not in default at the time the Amended Complaints were served upon his attorney. It would appear that under Rule 5(a) a default judgment based upon an amended complaint not served directly upon the defendant would be of questionable validity. There is no claim in the present case however that the judgment sought to be enforced was obtained by default.

CONCLUSION

Defendant-respondent Mecham, with others, incorporated a business, Great Basin Grain Company, in Idaho for profit, traveled to Idaho at lease once on the business of Great Basin Grain Company, engaged in the management of the Company by long-distance communication through an on-the spot business manager, over a period of two years, and gave his personal guarantee of the commercial account of Great Basin Grain Company in order to induce extension of credit to the Company in Idaho. The credit was extended, the Company failed, and Mecham now asserts

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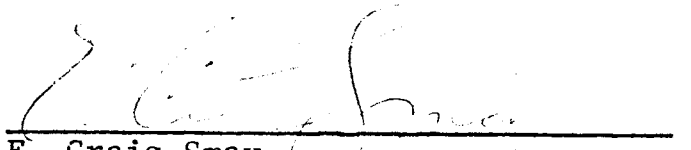
that he is immune from suit on his guarantee in Idaho.

Judge Sawaya, applying a rigid arithmetical approach, held that the number of Mecham's physical contacts with Idaho did not add up to jurisdiction. The ruling ignores the simple -- in fact, undisputed -- facts that Mecham was doing business through Great Basin Grain Company, the business was done in Idaho, and the claim herein arises out of that business. Craig W. Mecham extended his personal credit into Idaho for commercial purposes -- inducing extension of commercial credit in order to be able to carry on an Idaho business -- and extensive business was done there on that credit. The account established thereby has been defaulted upon. It defies logic or justice to bar Idaho citizens victimized by these practices from suit in Idaho to recover the resulting damages.

The judgment of the Third District Court herein should be reversed and summary judgment ordered for plaintiff-appellant.

Respectfully submitted,

VAN COTT, BAGLEY, CORNWALL & McCARTHY



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CERTIFICATE OF MAILING

THIS IS TO CERTIFY that a copy of the foregoing Brief of Appellant was mailed, postage prepaid, on this 19th day of March, 1976, to each of the following:

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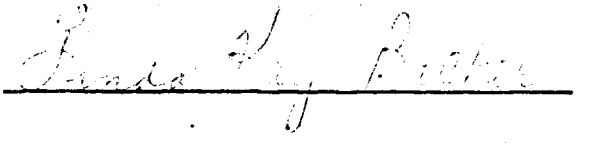

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